Supreme Court, U.S.
FILED
MAR 12 1999
CLERK

No. 98-993

In the Supreme Court of the United States

OCTOBER TERM, 1998

DALE LYNN RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

20P

QUESTIONS PRESENTED

1. Whether an appellate court should conduct *de novo* or deferential review of a district court's conclusion that there was no reasonable probability that evidence not disclosed to a defendant before trial would have affected the outcome of the case.

2. Whether the courts below correctly concluded that there was no reasonable probability that evidence not disclosed to petitioner before trial would have affected the outcome of this case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	2, 6, 9
Koon v. *United States*, 518 U.S. 81 (1996)	13
Kyles v. *Whitley*, 514 U.S. 419 (1995)	8, 9, 11
Ornelas v. *United States*, 517 U.S. 690 (1996)	13
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	10
Strickland v. *Washington*, 466 U.S. 668 (1984)	12
Thompson v. *Keohane*, 516 U.S. 99 (1995)	10
Townsend v. *Sain*, 372 U.S. 293 (1963)	10
United States v. *Agurs*, 427 U.S. 97 (1976)	14, 16
United States v. *Anderson*, 139 F.3d 291 (1st Cir.), cert. denied, 119 S. Ct. 158 (1998)	13
United States v. *Bagley*, 473 U.S. 667 (1985)	9, 11
United States v. *Bajakajian*, 118 S. Ct. 2028 (1998)	10
United States v. *Benlian*, 63 F.3d 824 (9th Cir. 1995)	12
United States v. *Blackwell*, 127 F.3d 947 (10th Cir. 1997)	12
United States v. *Cisneros*, 112 F.3d 1272 (5th Cir. 1997)	13
United States v. *Cuffie*, 80 F.3d 514 (D.C. Cir. 1996)	12, 14
United States v. *Miller*, 161 F.3d 977 (6th Cir. 1998), petition for cert. pending, No. 98-8033	14

Cases—Continued: Page

United States v. *Williams*, 81 F.3d 1434 (7th Cir. Cir. 1996) 14
United States v. *Zagari*, 111 F.3d 307 (2d Cir.), cert. denied, 522 U.S. 983 and 988 (1997) 10, 13
Wood v. *Bartholomew*, 516 U.S. 1 (1995) 11

Statutes and rule:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 11
18 U.S.C. 844(i) 2, 5, 6
28 U.S.C. 2254 (1994) 11
28 U.S.C. 2254(d) (1994) 11, 12
Fed. R. Crim. P. 33 ..... 2, 6, 12

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-993

DALE LYNN RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 153 F.3d 708. The opinion of the district court (Pet. App. 13-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1998. A petition for rehearing was denied on September 21, 1998. Pet. App. 35. The petition for a writ of certiorari was filed on December 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i). He was sentenced to 328 months' imprisonment. The court of appeals affirmed. 9 F.3d 660 (1993), on rehearing en banc, 41 F.3d 361 (1994), cert. denied, 514 U.S. 1082 (1995).

In October 1996, petitioner filed a motion for a new trial based on newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. Petitioner claimed, *inter alia*, that the government had violated the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence before his trial. The district court denied the motion (Pet. App. 13-34), and the court of appeals affirmed. Pet. App. 1-12.

1. In January 1989, petitioner assumed management of the Ryan Fun and Fitness Center in West Burlington, Iowa. The Center was owned by petitioner's father, a successful Kansas businessman who had previously backed petitioner in two failed business ventures. Petitioner immediately began a major remodeling effort. Petitioner soon lost his enthusiasm for the Center, however, and his relationship with his father became increasingly strained. On several occasions, petitioner stated that he wished that the Center would burn down. 9 F.3d at 662; Pet. App. 30.

On December 6, 1989, petitioner's father directed that the Center be closed. Petitioner had the locks changed, retaining possession of the only two keys. Petitioner then began efforts to sell the Center. On December 15, 1989, petitioner made a complete photographic record of the Center. On December 26, 1989, he

removed his personal property and some property belonging to the Center, ostensibly in an effort to ready the Center for sale. Petitioner later made a false claim for insurance coverage on the property belonging to the Center, claiming that it was lost in the fire. 9 F.3d at 662; Pet. App. 30.

On December 20, 1989, petitioner asked the telephone company to disconnect the Center's dedicated fire alarm line, as well as the regular phone line. Petitioner believed that the lines would be disconnected immediately. In fact, the regular phone line was disconnected on December 21, 1989, and the dedicated line was disconnected on December 28, 1989. Between December 20 and December 28, 1989, five trouble signals from the Center (caused by interruption in the electrical current or the dedicated phone line) were received at the West Burlington law enforcement station. In each instance, the alarm was reset at the Center's fire alarm panel, generally within a few minutes. On December 29, 1989, petitioner called the telephone company to verify the disconnection of the dedicated line. 9 F.3d at 662; Pet. App. 30-31.

On December 29, 1989, at approximately 2 a.m., West Burlington police officer Larry Garmoe made a routine check of the Center. In the parking lot, he noticed a car loaded with containers, including floor solvents, motor oil, and linseed oil. Officer Garmoe could not identify the labels of several additional containers located in the back seat. In November 1989, petitioner had received a ticket while driving a car with the same license number. Officer Garmoe also saw petitioner driving a car with the same license number on January 10, 1990. 9 F.3d at 663; Pet. App. 31.

On December 30 and 31, 1989, petitioner was distraught and depressed, apparently over a disagreement

with his girlfriend. At approximately 8:30 p.m. on January 1, 1990, the Center was discovered to be on fire. The firefighters who responded found all doors locked and no signs of forcible entry. During the firefighting and rescue effort, firefighters observed unusual fire behavior, similar, in their experience, to other fires that had been fueled by flammable liquids. Specifically,

> Two distinct and separate red-hot areas, approximately 50 feet apart, glowed on the roof; low bluish-colored flames which rekindled quickly when blackened with water danced on the floor; an intense wall of fire which did not respond to water swept across the lounge area; an isolated, interior fire confined to the sauna rekindled quickly when doused with substantial quantities of water; an unusual fire in the wall of the weight room also rekindled after being blackened with water.

Firefighters Wilt and Klein, the first firefighters to enter the Center, were discovered missing ten to fifteen minutes later. The bodies of the two firefighters were discovered inside the Center approximately three hours later. 9 F.3d at 663; Pet. App. 31-32.

Petitioner arrived at the fire scene shortly after the fire started. Petitioner began making inquiries about the origin of the fire, telling the firefighters that he hoped they did not think it was arson. Petitioner became very agitated when he learned that two firefighters were missing. Approximately four to five days later, petitioner wrote to his girlfriend, stating that he did not start any "fires" at the Center. 9 F.3d at 663; Pet. App. 32.

In late December 1989, petitioner made serious inquiries about the purchase of a bar in Gulf Port, Illinois,

indicating that money was no problem. On January 2, 1990, petitioner again spoke with the owner of the bar about the purchase, but failed to mention the fire at the Center. 9 F.3d at 663; Pet. App. 31.

Subsequent investigations by the Iowa Fire Marshal's office and an electrical engineer revealed that petitioner had the only key at the time of the fire (the other having been lost in the snow), that the circuit breaker for the fire-alarm panel had been turned off, and that the battery backup to the alarm had been disconnected before the fire. 9 F.3d at 663; Pet. App. 33.

2. Petitioner was indicted on one count of arson, in violation of 18 U.S.C. 844(i). At trial, expert witnesses for the government testified that there were multiple points of origin for the fire, and that accelerants (probably flammable liquids) had been used to start the fire. Although laboratory tests for flammable liquids, conducted on 26 samples taken from the fire scene, were negative, two experts testified that flammable liquids can be diluted, can evaporate, or can be totally consumed by fire. Thus, the use of flammable liquids cannot always be detected. The experts based their conclusions in part on the presence of "deep charred burn patterns" on the Center's floors, which the experts viewed as indicative that flammable liquids had been used to start the fire. 9 F.3d at 663; Pet. App. 3, 20, 24-25, 33.

Petitioner testified at trial and called five expert witnesses in his behalf. Petitioner's theory of defense was that a cash register, which he accidentally knocked off of the counter, caused the fire, which then spread to the other areas of the Center. Petitioner contended that the multiple burn patterns were caused by pieces of flammable materials falling from the ceiling and that

the fire spread through the roof. Petitioner also offered evidence in support of the theory that the phenomena of "flashover" and "backdraft" caused the unusual fire behavior witnessed by the firefighters. 9 F.3d at 663; Pet. App. 33.

3. Petitioner's conviction was affirmed by the court of appeals, sitting en banc, on October 31, 1994.[1] On October 30, 1996, petitioner filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure,[2] contending, *inter alia*, that the government violated the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence relating to burn tests conducted on wood flooring material retrieved from the Center. Pet. App. 15. During these tests, an agent of the Iowa Fire Marshal's Office poured denatured alcohol on the flooring material and ignited it, an action that failed to cause deep charring. Such charring did occur, however, when alcohol was combined with other combustible materials, placed on the floor, and ignited. *Id.* at 15-18.[3] Petitioner also contended that the government violated *Brady* by failing

---

[1] A panel of the court of appeals affirmed petitioner's conviction. 9 F.3d at 664-673. The court of appeals subsequently granted en banc review to consider the sufficiency of the evidence and the adequacy of the jury instructions on the interstate commerce element of 18 U.S.C. 844(i). 41 F.3d at 362-367.

[2] Rule 33 provides, in relevant part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

[3] The prosecution was not informed that these tests had been performed. Pet. App. 4.

to disclose that one of its trial experts, John DeHaan, believed that deep charred burn patterns on the Center's hardwood floors were not caused by the use of flammable liquids. *Id.* at 15, 19.

Following a lengthy evidentiary hearing, the district court denied petitioner's motion. While concluding that the burn tests and DeHaan's opinion had "aspects favorable to the defense" and should therefore have been revealed before trial, the district court concluded that there was no reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed. Pet. App. 24-25, 25-27. The court noted that the theory that deep charring had been caused by a flammable liquid was only "a small part of a lot of evidence pointing to a multiple origin fire." *Id.* at 25. Other evidence included observations by the firefighters about the behavior and characteristics of the fire, opinion testimony by DeHaan and others, and evidence of burn patterns. *Id.* at 25-26. Furthermore, the court found "[a]dditional circumstantial evidence that the fire was arson" in petitioner's own conduct and statements, both before and after the fire. *Id.* at 26. As a result, the court concluded, "the impact of [the burn tests and DeHaan's opinion about the meaning of certain charring] on the jury would have been minimal." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-12. It began by addressing the appropriate standard of review:

> We review a district court's denial of a motion for new trial based on newly discovered evidence for abuse of discretion. *See United States v. Hiveley*, 61 F.3d 1358, 1361 (8th Cir. 1995) (per curiam); *United States v. Costanzo*, 4 F.3d 658, 667 (8th Cir. 1993).

> This standard also applies where, as here, a defendant seeks a new trial premised upon a *Brady* claim. *See United States v. Stuart*, No. 97-1671, slip op. at 3 (8th Cir. 1998); *United States v. Kern*, 12 F.3d 122, 126 (8th Cir. 1993); *United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996).

Id. at 5-6.

The court then considered whether the undisclosed evidence was "material under *Brady*," *i.e.*, whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Pet. App. 6 (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995)). In performing this task, the court explained that it "must consider what the government's case would have looked like if the defense had had access to the burn tests and had been aware of Dehaan's disagreement [with other government experts]." *Id.* at 7. After reviewing the government's evidence at trial, including the testimony of firefighters and the other substantial evidence of arson,[4] the court concluded that "[t]he presence of the hardwood floor burn patterns * * * was only a small part of the government's well-supported theory that the fire was intentionally set." *Id.* at 8-9.

The court further noted that "both the burn tests and Dehaan's disagreement with other government experts" had "limited exculpatory value" because (1) the burn tests were performed under less-than-ideal cir-

---

[4] That evidence included "post-fire observations of several hot spots, burn patterns on walls that appeared to burn in a downward direction, carpet burns that were consistent with the use of a flammable liquid, and a post-fire analysis of the Center's structure that suggested a multiple-origin fire." Pet. App. 8.

cumstances; (2) the tests failed to produce a "flashover," which was the defense's explanation of the rapid spread of the fire; and (3) DeHaan admitted on cross-examination that some of the burn patterns could have resulted from falling materials. Pet. App. 9. Accordingly, the court concluded that "the *Brady* evidence would have had a negligible impact on the jury's decision. Thus, it is not reasonably probable that the evidence would have changed the outcome had it been disclosed. The district court therefore did not abuse its discretion in denying a new trial on this issue. *See Kern*, 12 F.3d at 126." *Ibid.*

ARGUMENT

1. Petitioner contends that the circuits are split on the appropriate standard of review for *Brady* claims, and that the court of appeals erred in applying an abuse-of-discretion standard to his new-trial motion. Pet. 13-19. That claim does not warrant further review.

a. In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In subsequent cases, the Court has held that undisclosed evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). A "reasonable probability" of a different result is shown "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678).

b. We agree with petitioner that a district court's conclusion as to the materiality of undisclosed evidence should be reviewed *de novo*.[5] To determine whether a *Brady* violation has occurred, a court must assess the undisclosed evidence in light of the evidence actually presented at trial to determine whether there is a "reasonable probability" that disclosure would have caused a different result.[6] Although highly fact-specific, that inquiry requires courts to apply a legal standard to the circumstances of a particular case. Accordingly, the materiality inquiry is properly characterized as a "mixed question[ ] of fact and law." See, *e.g.*, *Thompson* v. *Keohane*, 516 U.S. 99, 109-110 (1995) (quoting *Townsend* v. *Sain*, 372 U.S. 293, 309 n.6 (1963)); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982) (mixed question is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

Although this Court has not expressly decided the question, its cases clearly indicate that materiality

---

[5] The government argued below that "mixed questions of law and fact associated with a *Brady* issue shall be reviewed *de novo* on appeal." Gov't C.A. Br. 10. It also argued that "[t]he trial judge's conclusion as to the effect of nondisclosure on the outcome of the trial is entitled to great weight." *Id.* at 11 (citing *United States* v. *Zagari*, 111 F.3d 307, 319 (2d Cir.), cert. denied, 522 U.S. 983 and 988 (1997)).

[6] Of course, the district court may also need to resolve disputed matters of historical fact bearing on a defendant's *Brady* claim. Such determinations are reviewable only for clear error. See *United States* v. *Bajakajian*, 118 S. Ct. 2028, 2037-2038 n.10 (1998).

rulings are to be reviewed *de novo*. First, this Court has not afforded deference to lower-court determinations as to the materiality of undisclosed evidence. For example, in *Kyles*, which involved a challenge under 28 U.S.C. 2254 (1994) to a state conviction, the Court appeared to review the defendant's *Brady* claim *de novo*, and did not suggest that the materiality of the undisclosed information was a factual issue subject to deference under Section 2254(d).[7] 514 U.S. at 441-454. Similarly, when the Court in *Bagley* remanded the case to the court of appeals to determine whether the undisclosed evidence was material, it did so without suggesting that the appellate court should defer to the district court's own determination of the issue. 473 U.S. at 683-684. See also *Wood* v. *Bartholomew*, 516 U.S. 1 (1995) (per curiam) (Court decides materiality of undisclosed evidence without indicating that the district court's determination of the issue was entitled to deference).

Second, the test for determining whether undisclosed evidence is "material" under *Brady* is identical to the test for determining whether a defendant has suffered

---

[7] When *Kyles* was decided, Section 2254(d) established a rebuttable presumption that certain state-court factual findings were correct. See 28 U.S.C. 2254(d) (1994). Section 2254(d) has since been amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (prohibiting grant of habeas corpus on basis of claim previously adjudicated on merits in state proceeding unless state decision was contrary to, or involved an unreasonable application of, federal law as determined by this Court, or was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding; state-court factual findings are presumed correct and applicant bears burden of rebutting presumption by clear and convincing evidence).

prejudice as a result of the deficient performance of his counsel. See *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (defendant alleging ineffective assistance of counsel must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). The Court made clear in *Strickland* that the prejudice inquiry is a mixed question subject to *de novo* review. *Id.* at 698 (prejudice component of the ineffectiveness inquiry is a mixed question of law and fact not subject to deference owed to fact findings under former 28 U.S.C. 2254(d)).

Following *Strickland*, the courts of appeals have conducted *de novo* review of district court determinations of whether it was reasonably probable that an attorney's ineffectiveness affected the outcome of a proceeding. See, *e.g.*, *United States* v. *Blackwell*, 127 F.3d 947, 955 (10th Cir. 1997); *United States* v. *Benlian*, 63 F.3d 824, 826 (9th Cir. 1995). Given that the reasonable-probability determination is reviewed *de novo* in ineffective assistance of counsel cases, the analogous determination should also be reviewed *de novo* in cases involving claimed *Brady* violations.[8]

c. Although this Court's cases strongly support a conclusion that materiality determinations under *Brady*

---

[8] We agree with petitioner (Pet. 16-17) that *de novo* review is appropriate whether a *Brady* claim is considered on direct appeal or on review from the denial of a new-trial motion under Rule 33. Because they usually involve claims that exculpatory evidence was not disclosed before trial, *Brady* claims are typically raised in new-trial motions under Rule 33. Even those *Brady* claims that are adjudicated on direct appeal typically are decided in the first instance by the district court pursuant to a post-trial motion for a new trial. See, *e.g.*, *United States* v. *Cuffie*, 80 F.3d 514 (D.C. Cir. 1996).

should be reviewed *de novo*, petitioner rightly points out (Pet. 13-16 & nn.10-22) (citing cases) that the courts of appeals have not yet adopted a consistent approach to the question. Some of the inconsistency may be more apparent than real, however. In several of the cited cases, for example, the court, after saying that rulings on new-trial motions are reviewed for abuse of discretion, reviews the district court's materiality determination without according that determination any deference. See, *e.g.*, *United States* v. *Anderson*, 139 F.3d 291, 296 (1st Cir.), cert. denied, 119 S. Ct. 158 (1998); *United States* v. *Cisneros*, 112 F.3d 1272, 1277-1278 (5th Cir. 1997).[9] In another, the court of appeals indicates that it will conduct an independent review of a district court's materiality ruling, while at the same time indicating that it will give the district court's ruling great weight. *United States* v. *Zagari*, 111 F.3d 307, 320 (2d Cir.), cert. denied, 522 U.S. 983 and 988 (1997); cf. *Ornelas* v. *United States*, 517 U.S. 690, 699-700 (1996) (court of appeals should review *de novo* district court rulings as to probable cause and reasonable suspicion, but should "give due weight" to district

---

[9] General application of an abuse-of-discretion standard of review to rulings on new-trial motions is not necessarily inconsistent with the conclusion that materiality determinations under *Brady* are subject to *de novo* review. If the issue of materiality is viewed as predominantly legal and therefore subject to *de novo* review, then a trial court's erroneous ruling on that issue would amount to an abuse of discretion. See, *e.g.*, *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law.") (citation omitted).

court's finding that officer's inferences were reasonable); *United States* v. *Agurs*, 427 U.S. 97, 114 (1976) (in finding that no *Brady* violation occurred, Court points out that trial judge remained convinced of defendant's guilt beyond reasonable doubt and "his firsthand appraisal of the record was thorough and entirely reasonable").

It does appear, however, that at least one court of appeals has unequivocally held that the district court's finding as to materiality under *Brady* should be reviewed with deference. See *United States* v. *Williams*, 81 F.3d 1434, 1438-1441 (7th Cir. 1996) (court of appeals should affirm trial court's ruling as to materiality under *Brady* so long as trial court's ruling is "reasonable"). Conversely, several courts of appeals have clearly held that materiality determinations under *Brady* are reviewable *de novo*. See, *e.g.*, *United States* v. *Miller*, 161 F.3d 977, 987 (6th Cir. 1998), petition for cert. pending, No. 98-8033; *United States* v. *Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996).

d. The question whether the courts of appeals should conduct *de novo* or deferential review of district court materiality determinations under *Brady* might merit this Court's attention in a suitable case. This case is not, however, an appropriate vehicle for resolving that question. The court of appeals did state that an abuse-of-discretion standard applies to cases in which a district court decides a new-trial motion premised on a *Brady* claim, and it quoted the Seventh Circuit's rationale for deferential review. Pet. App. 5-6. But its actual analysis did not depend on that deferential standard of review. Instead, the court independently considered the probative value of the undisclosed evidence in light of the additional evidence of arson presented by the government. *Id.* at 6-9. After engaging

in this careful and fact-specific analysis, the court concluded that "the *Brady* evidence would have had a negligible impact on the jury's decision" and that "it is not reasonably probable that the evidence would have changed the outcome had it been disclosed." *Id.* at 9. Thus, notwithstanding its statement that review was deferential, the court of appeals actually engaged in a *de novo* review of the district court's ruling. *Ibid.*[10] Because petitioner would not benefit from a ruling that district court determinations of materiality under *Brady* are properly subject to *de novo* review, further review is unwarranted in this case. For the same reason, this case would not be an appropriate one in which to address the inconsistent approaches taken by the courts of appeals on the issue.

2. Petitioner raises a number of additional challenges to the lower court's resolution of his *Brady* claim. Pet. 19-29. Each challenge lacks merit and none presents an important legal issue worthy of certiorari review.

First, petitioner contends that the lower courts appeared to apply a "sufficiency of evidence" test to his *Brady* claim. Pet. 22-23. The lower court opinions refute this claim. In fact, both lower courts expressly noted that "a materiality determination is not a sufficiency of evidence test." Pet. App. 7 (court of appeals); *id.* at 22 (district court). Moreover, the Eighth Circuit's observation that "materiality is not established through

---

[10] Having found no reasonable probability that the evidence would have changed the outcome if disclosed, the court of appeals noted that "[t]he district court therefore did not abuse its discretion in denying a new trial on this issue." Pet. App. 9. In other words, the court of appeals in this case ruled that the district court did not abuse its discretion because its decision was correct.

the mere possibility that the suppressed evidence might have influenced the jury" in no way demonstrates a misapplication of law. *Id.* at 7; see Pet. 22. To the contrary, this Court has made precisely the same observation. *Agurs*, 427 U.S. at 109-110 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

Second, petitioner incorrectly contends that the court of appeals "fail[ed] to conduct an analysis of the cumulative effect the undisclosed evidence would have had." Pet. 23. In fact, the court of appeals clearly considered the burn tests and DeHaan's opinion regarding the charring of the hardwood floors collectively in assessing the effect the undisclosed evidence might have had on the case. See Pet. App. 9 (noting that both items of evidence had "limited exculpatory value").

Finally, petitioner repeatedly disagrees with the court of appeals' assessment of the significance of the undisclosed evidence. Pet. 23-28; see, *e.g.*, Pet. 25 ("The court of appeals failed to appreciate the impact this evidence could have had."). In particular, petitioner contends that "the government theory of a multiple origin fire was based primarily on the burn pattern evidence." Pet. 24. Both lower courts correctly explained why that assessment of the government's case is incorrect. Pet. App. 7-9 (court of appeals); *id.* at 25-27 (district court). In fact, the jury was presented with a wealth of evidence pointing to arson. See *ibid.* In any event, that issue is entirely factbound and merits no further review.[11]

---

[11] Petitioner faults both lower courts for "fail[ing] to analyze properly the cumulative effect of the suppressed evidence on

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney

MARCH 1999

---

punishment." Pet. 28. The district court, which sentenced petitioner, concluded that its "confidence in the jury's guilty verdict" was not undermined by the undisclosed evidence and that the impact of that evidence on the jury would have been minimal. Pet. App. 25-26. There is no reason to believe that the same evidence would have had any effect on the lower court's sentencing findings.